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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 429

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,

Petitioners,

vs.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF.

R. M. HUGHES, JR.,
ALFRED ANDERSON,
JONATHAN W. OLD, JR.,
W. C. COUPLAND,
Counsel for Petitioners.

SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
Summary and Contents of Brief	9
Brief in Support of Petition	10

TABLE OF AUTHORITIES.

Page

Alston, et al. v. *School Board of City of Norfolk, et al.*, 112 Fed. 2d, p. 992 3

American Jurisprudence, Vol. 11, pp. 1170 & 1171. 19-26

American Law Reports, Vol. 75, p. 1352 15

Bon Ton Cleaners & Dyers, Inc. v. *Cleaning, Dyeing & Pressing Board*, 176 Sou. 55 28

Cooley on Constitutional Limitations, Vol. 1, pp. 368 and 369 26

Corpus Juris, Vol. 12, pp. 769, 770, 744; Vol. 56, pp. 382, 387, 422 16-25

Eustis v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111 ... 29

Heath v. *Johnson*, 15 S. E. 980 15

Mills v. *Lowndes, et al.*, 26 Fed. Supp. 792 33

Mills v. *Anne Arundel County Board of Education, et al.*, 30 Fed. Supp. 245 33

Mootz v. *Belyea*, 236 N. W. 358 17-34

Mo. ex rel Gaines v. *Canada*, 305 U. S. 337, 83 L. Ed. 208 5-24

Palumbo v. *Fuller Company*, 122 Atl. 63 28

People ex rel Fursman v. *Chicago*, 116 N. E. 158.. 7-22

Pierce v. *Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316 29

Pierce Oil Corp. v. *Phoenix Refining Company*, 259 U. S. 125, 66 L. Ed. 855 31

Ruling Case Law, Vol. 24, p. 613 15

Seattle High School, etc. v. *Sharpless, etc.*, 293 Pac. 994, 72 A. L. R. 1215 7-17-20-34

TABLE OF AUTHORITIES—Continued.

Page

Shepard, et als. v. *Barron*, 194 U. S. 553, 48 L. Ed. 1115 32

State ex rel Gumm, et als. v. *Albritton, et als.*, 224 Pac. 511 23

State v. *Martin*, 163 S. E. 850 15

United States v. *Gale*, 109 U. S. 65, 27 L. Ed. 857 .. 5-27

Wall v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 61 L. Ed. 1229 31

Washington v. *State of Florida*, 116 Sou. 470, 278 U. S. 599, 73 L. Ed. 528 5-26

White v. *State of Oklahoma*, 214 Pac. 202 28

Federal Rules of Civil Procedure, Rule 38 33

Norfolk City Charter (Acts of Assembly of Virginia, 1918, p. 31), Section 114 13

Virginia Code—Section 611 11
Section 680 12
Section 786 12
Section 664 13

Virginia Constitution, Article IX—Section 130 ... 11
Section 133 ... 11
Section 140 ... 12

United States Code Annotated, Title 28, Sec. 347. 7

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SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,

Petitioners,

vs.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,

Respondents.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

PETITION.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of the School Board of the City of Norfolk, Virginia, a body corporate, and C. W. Mason, Superintendent of Public Schools of the City of Norfolk, Virginia, respectfully shows to this Honorable Court as follows:

1. The above entitled cause was a suit instituted in November, 1939, in the District Court of the United States for the Eastern District of Virginia, at Norfolk, against your petitioners by the respondents, Melvin O. Alston, a negro teacher in the Public Schools of the City of Norfolk, and the Norfolk Teachers' Association, an unincorporated association composed entirely of negro teachers in said Public Schools, for the purpose of obtaining a judgment declaring that the petitioners, in maintaining, as alleged, a salary schedule for teachers in the Public Schools of the City of Norfolk which fixes the salaries of negro teachers at lower rates than those paid white teachers, solely on account of race and color, violate the due process and equal protection clauses of the Fourteenth Amendment; and also to obtain an injunction to restrain petitioners from making any distinction solely on account of race and color in salaries of public school teachers.

2. In the answer filed by your petitioners, legal questions were presented under "First," "Second" and "Third" defenses, which petitioners claim preclude respondents from the relief asked. These legal defenses were (a) that neither C. W. Mason, Superintendent of Schools, nor the Norfolk Teachers' Association, were proper parties to the suit, (b) that no constitutional rights of the respondent Melvin O. Alston had been violated, and (c) that he had waived such constitutional rights, if any he had, by voluntarily entering into and accepting employment under a written contract with said School Board to teach for ten school months beginning September 7, 1939 at a salary of $92.10 per month. (R. 20.)

Under the "Fourth" defense of said answer, petitioners expressly denied that the differences between salaries paid negro teachers and white teachers were solely on grounds of race and color, as alleged in the complaint, but that they are determined by annual written contracts voluntarily entered into between the School Board and the individual teachers, and also denied that any consitutional rights had been violated. At the suggestion of the District Court, the legal questions raised by the "First," "Second" and "Third" defenses of the answer were considered and disposed of in advance of a trial of the case on its merits, and the District Court held (1) that the said Melvin O. Alston and the School Board of the City of Norfolk were the only necessary parties to the suit; (2) that the said Melvin O. Alston having voluntarily entered into a contract with the said School Board to teach and having taught thereunder prior to the institution of this suit, had waived such consitutional rights, if any he has, which he seeks to enforce in this suit; and (3) dismissed the complaint. (R. 23, 30). All of the teachers in the respondent association were under similar contracts and their status with reference to employment is the same as that of the said Melvin O. Alston.

3. From the judgment of the District Court the respondents appealed to the Circuit Court of Appeals for the Fourth Circuit. On June 18, 1940, a decision was handed down reversing the decision of the District Court, the cause having been heard before Circuit Court Judges Parker, Soper and Dobie, Judge Parker having written the opinion. (R. 36). This opinion is reported in 112 Fed. 2d. at p. 992. The mandate was

issued forthwith, and before your petitioners could ask for a stay. When they received notice of the decision and asked for a stay of the mandate, in order to afford them an opportunity to apply to this Honorable Court for a writ of certiorari, they were advised to either ask this Honorable Court for a stay, or else file a petition for a recall of the mandate.

Your petitioners, therefore, ask that this Honorable Court enter the necessary order for the purpose of staying the mandate until this, its petition can be considered.

4. A transcript of the Record is herewith filed. The complaint is found at p. 4. The answer to the complaint is found at pp. 18 and 32. The opinion of the District Court is found at p. 23. The judgment of the District Court is found at p. 30, and the decision of the Circuit Court of Appeals is found at p. 36.

5. The legal questions involved are:

(1) Whether any constitutional rights of the respondents have been violated.

(2) Whether respondents have waived such constitutional rights, if any they have, in the premises.

The merits of these questions will be discussed in the brief herewith filed in support of this petition, and no attempt will be made to elucidate these issues at this point.

6. We shall now undertake to state reasons why we contend that this is a case in which a writ of certiorari should be issued by the Supreme Court.

These reasons are:

A. The Appellate decision in this case has decided a Federal question, in a way probably in conflict with applicable decisions of this Honorable Court.

It is the individual who is entitled to the equal protection of the laws (*Mo. ex rel Gaines* v. *Canada*, 305 U. S. 337; 83 L. Ed. 208). This Court has consistently held that these individual rights can be waived. *Washington* v. *State of Florida*, 278 U. S. 599; 73 L. Ed. 528; *United States* v. *Gale*, 109 U. S. 65; 27 L. Ed. 857; and others cited in the supporting brief herewith.

The District Court applied these decisions to the respondents who voluntarily entered into contracts and taught thereunder without objection, and dismissed the complaint. The Appellate decision reversed this ruling.

B. The Appellate decision decides an important question of Federal law, which has not been, but should be settled by this Court.

This Court has decided the right of negroes to equal State facilities. (*Mo. ex rel Gaines* v. *Canada*, Supra). But it has not decided the important question of the right of voluntary contract between a School Board, a body corporate under State laws, and teachers in the Public Schools of the State whereby the salaries of the teachers are agreed upon and determined.

The Appellate decision in this case holds in effect that such contracts are invalid unless the salaries of white and negro teachers similarly situated are equal. The State is required to provide equal school facilities, but it does not

follow that salaries in Public Schools must be equal when determined by voluntary contracts.

The Constitution and Laws of Virginia provide for a system of Public Schools throughout the State. They are operated and controlled by a State Board of Education and a School Board in each locality. The School Board of the City of Norfolk, as are other local School Boards, is controlled in its functions by State laws. The State Law and Constitution provide that separate schools shall be maintained to afford educational facilities to the children of the State and not for the purpose of affording anyone an opportunity to follow his vocation as a teacher. The teachers in Public Schools of Virginia are not under Civil Service and have no tenure of office. The School Boards of the respective localities are required by the State law to employ the teachers and to enter into annual written contracts with each in form prescribed by the State Board of Education, covering the service to be performed and the compensation to be received by the teacher. Briefly stated, the relations between the School Board and the teacher is that of employer and employee. The applicable school laws are quoted in the supporting brief and will not be quoted at this point.

C. The Appellate decision decides a question of local law in a way probably in conflict with applicable local decisions.

Prior to the institution of this suit counsel for the respondents here instituted a suit in the Circuit Court of the City of Norfolk under the style of *Aline Elizabeth Black* v. your petitioners, *School Board of the City of Norfolk*, a body corporate, and *C. W. Mason, Superintendent of*

Schools of Norfolk, in which the same allegations and prayers were made as in the instant suit. The Court in that case dismissed the complaint. (R. 22). No appeal was taken and the judgment has become final. It is most probable that the Supreme Court of Appeals of Virginia would have affirmed this judgment.

School laws similar to those of Virginia have been upheld in the cases of *Seattle High School, etc.* v. *Sharpless, etc.*, (Wash.), 293 Pac. 994; 72 A. L. R. 1215, and *People ex rel Fursman* v. *Chicago*, 1916, 116 N. E. 158. These are more fully considered in the supporting brief herewith.

7. The jurisdiction of this Court is invoked under Section 240-a of the judicial code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347). The judgment of the Circuit Court of Appeals was entered on June 18, 1940.

Wherefore, upon due consideration of this petition and the annexed brief and the certified copy of the record of the Circuit Court of Appeals for the Fourth Circuit filed herewith, the defendants and petitioners respectfully pray that a stay of the mandate from the Circuit Court of Appeals of the Fourth Circuit in this case may be ordered; that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in this cause, to the end that the same may be reviewed and determined by this Honor-

able Court. And petitioners pray that upon a final consideration of this cause the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court and that the judgment of the United States District Court be affirmed and judgment rendered in favor of the defendant.

Petitioners further pray for such other, equitable and general relief as may appertain to this case and as may be competent for this Honorable Court to grant.

R. M. HUGHES, JR.,
ALFRED ANDERSON,
JONATHAN W. OLD, JR.,
W. C. COUPLAND,
Counsel for Petitioners.

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

Before me, the undersigned Notary Public, personally appeared R. M. Hughes, Jr., who being duly sworn, deposes and says: That he is a member of the bar of the Supreme Court of the United States, and is of counsel for petitioners herein; that he has read the foregoing application for a writ of certiorari; and that all of the facts therein stated are true and correct to the best of his knowledge and belief.

R. M. HUGHES, JR.

Subscribed and sworn to before me
this 4th day of September, 1940.

JULIA K. GOFF,
(Seal) *Notary Public.*

My commission expires February 7, 1943.

SUMMARY AND CONTENTS OF BRIEF.

Page

I. No Constitutional Rights Violated..... 11

A. School Teachers in Virginia are Employees of School Board..... 11

B. Equal Protection Clause of Fourteenth Amendment not Applicable..... 19

II. Respondents by Entering Into Contracts with School Board of City of Norfolk and Accepting Employment Thereunder, Waived Such Constitutional Rights, if any They Have, That They Seek to Enforce..... 24

III. Differentiation of the Mills Cases from the Instant Case..... 33

A. The Equal Protection Clause of the Fourteenth Amendment Has No Application to the Instant Case..... 34

B. The Respondents Have Waived Any Rights to the Relief for Which They Pray..... 37